"[F]ederal law, as determined by the Supreme Court, may as much be a generalized standard that must be followed, as a bright-line rule designed to effectuate such a standard in a particular context." *Overton v. Newton*, 295 F.3d 270, 278 (2d Cir. 2002); *see also Yung v. Walker*, No. 01-2299, 2002 U.S. App. LEXIS 28137 (2d Cir. Aug. 1, 2003) (amended opinion) (district court's habeas decision that relied on precedent from the court of appeals is remanded for reconsideration in light of "the more general teachings" of Supreme Court decisions). The Court of Appeals for the Second Circuit has also indicated that habeas relief may be granted if a state court's decision was contrary to or an unreasonable application of "a reasonable extension" of Supreme Court jurisprudence. *Berbary v. Torres*, No. 02-2463, 2003 U.S. App. LEXIS 16167, at *25 (2d Cir. Aug. 7, 2003). Determination of factual issues made by a state court "shall be presumed to be correct," and the applicant "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

III. Limitations Period

Congress has set a one-year period of limitations for the filing of an application for a writ of habeas corpus by a person in custody pursuant to a state court judgment. *See* 28 U.S.C. § 2244(d)(1). This limitations period ordinarily begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). A conviction becomes final for habeas purposes when the ninety-day period for filing a petition for a writ of certiorari to the United States Supreme Court has expired. *See McKinney v. Artuz*, No. 01-2739, 2003 U.S. App. LEXIS 6745, at *22 (2d Cir. 2003); *see also* Sup. Ct. R. 13.

Prisoners whose convictions became final before the effective date of AEDPA, April 24, 1996, had a grace period of

one year, until April 24, 1997, to file their habeas application. *See Ross v. Artuz*, 150 F.3d 97, 103 (2d Cir. 1998).

"[T]he district court has the authority to raise a petitioner's apparent failure to comply with the AEDPA statute of limitation on its own motion." *Acosta v. Artuz*, 221 F.3d 117, 121 (2d Cir. 2000). "If the court chooses to raise sua sponte the affirmative defense of failure to comply with the AEDPA statute of limitation, however, the court must provide the petitioner with notice and an opportunity to be heard before dismissing on such ground." *Id.*

In calculating the one-year limitation period, the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted . . . ." 28 U.S.C. § 2244(d)(2). The "filing of creative, unrecognized motions for leave to appeal" does not toll the statute of limitations. *Adeline v. Stinson*, 206 F.3d 249, 253 (2d Cir. 2000); *see also Artuz v. Bennett*, 531 U.S. 4, 8 (2000) ("[A]n application is '*properly* filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee . . . . The question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." (emphasis in original; footnote omitted)).

The term "pending" in the statute has been construed broadly to encompass all the time during which a state prisoner attempts, through proper use of state procedures, to exhaust state court remedies with regard to a particular post-conviction application. *See Bennett v. Artuz*, 199 F.3d 116, 120 (2d Cir.

1999), *aff'd*, 531 U.S. 4 (2000). "[A] state-court petition is 'pending' from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures." *Bennett*, 199 F.3d at 120; *Carey v. Saffold*, 536 U.S. 214 (2002) (holding that the term "pending" includes the intervals between a lower court decision and a filing in a higher court for motions for collateral review). A motion for extension of time to file an appeal does not toll AEDPA's limitations period unless an extension is actually granted. *See Bertha v. Girdich*, 293 F.3d 577, 579 (2d Cir. 2002).

The period of limitations set forth in AEDPA ordinarily does not violate the Suspension Clause. *See Muniz v. United States*, 236 F.3d 122, 128 (2d Cir. 2001) ("[T]he Suspension Clause does not always require that a first federal petition be decided on the merits and not barred procedurally" (quotation omitted)); *Rodriguez v. Artuz*, 990 F. Supp. 275, 283 (S.D.N.Y. 1998) (AEDPA statute of limitations is not, "at least in general," an unconstitutional suspension of the writ).

A pro se litigant is accorded "some degree of latitude" in meeting filing requirements. *Brown v. Superintendent*, 1998 U.S. Dist. LEXIS 1936, No. 97 Civ. 3303, 1998 WL 75686, at *4 (S.D.N.Y. Feb. 23, 1998). But "[it] has long been recognized that ignorance does not excuse lack of compliance with the law." *Velasquez v. United States*, 4 F. Supp. 2d 331, 334-35 (S.D.N.Y. 1998) (holding that Bureau of Prison's failure to notify prisoners regarding AEDPA's time limitation did not warrant acceptance of untimely petition); *see also Brown*, 1998 WL 75686 at *4 ("self-serving statement that the litigant is ignorant of the law is not grounds for equitable tolling of a statute of limitations").

The Supreme Court held in *Duncan v. Walker* that "an application for federal habeas corpus review is not an

'application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2)," and that therefore the section does "not toll the limitation period during the pendency of [a petitioner's] first federal habeas petition." 533 U.S. 167, 181-82 (2001). *Duncan* reversed a case in this circuit which held to the contrary. *See Walker v. Artuz*, 208 F.3d 357, 361-62 (2000). Although the Supreme Court has now declared that AEDPA's one-year limitations period is not tolled during the pendency of a properly filed federal habeas petition, this statute of limitations is not jurisdictional and may be tolled equitably. *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). "Equitable tolling . . . is only appropriate in 'rare and exceptional circumstances.' To merit application of equitable tolling, the petitioner must demonstrate that he acted with 'reasonable diligence' during the period he wishes to have tolled, but that despite his efforts, extraordinary circumstances 'beyond his control' prevented successful filing during that time." *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001).

Although state prisoners are not entitled to counsel as of right in either New York state collateral or federal habeas corpus proceedings, the Court of Appeals for the Second Circuit has stated that "any attorney's conduct, if it is sufficiently egregious, may constitute the sort of 'extraordinary circumstances' that would justify the application of equitable tolling to the one-year limitations period of AEDPA." *Baldayaque v. United States*, No. 02-2611, 2003 U.S. App. LEXIS 15063, at *17 (2d Cir. July 30, 2003); *compare Smaldone*, 273 F.3d at 138-39 (attorney calculation error does not justify equitable tolling).

Prisoners cannot circumvent the strict AEDPA limitations period by invoking the "relation back" doctrine by arguing that a new petition should be treated as having been

filed on the same day as a first petition. As the court of appeals has explained,

> If [the limitations period] were interpreted as Petitioner argues, the result would be impractical. A habeas petitioner could file a non-exhausted application in federal court within the limitations period and suffer a dismissal without prejudice. He could then wait decades to exhaust his state court remedies and could also wait decades after exhausting his state remedies before returning to federal court to "continue" his federal remedy, without running afoul of the statute of limitations.

Warren v. Garvin, 219 F.3d 111, 114 (2d Cir. 2000) (quoting *Graham v. Johnson*, 158 F.3d 762, 780 (5th Cir. 1999)).

IV. Exhaustion

In the past, a state petitioner's federal habeas petition had to be dismissed if the prisoner did not exhaust available state remedies as to any of his federal claims. *See Rose v. Lundy*, 455 U.S. 509, 522 (1989). "This exhaustion requirement is . . . grounded in principles of comity: in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The exhaustion requirement requires the petitioner to have presented to the state court "both the factual and legal premises of the claim he asserts in federal court." *Daye v. Attorney General*, 696 F.2d 186, 191 (2d Cir. 1982) (en banc).

Pursuant to AEDPA, a district court may now, in its discretion, *deny* on the merits habeas petitions containing

unexhausted claims -- so-called "mixed petitions." *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state."). In addition, the state may waive the exhaustion requirement, but a "State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." *Id.* § 2254(b)(3); *see also Ramos v. Keane*, No. 98 CIV. 1604, 2000 U.S. Dist. LEXIS 101, at *10 (S.D.N.Y. 2000) (state's failure to raise exhaustion requirement does not waive the issue).

V. Procedural Bar

A federal habeas court may not review a state prisoner's federal claims if those claims were defaulted in state court pursuant to an independent and adequate state procedural rule, "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. In determining whether a procedural bar is sufficient to preclude habeas review, a federal court must consider as "guideposts" the following:

> (1) whether the alleged procedural violation was actually relied on in the trial court, and whether perfect compliance with the state rule would have changed the trial court's decision; (2) whether state case law indicated that compliance with the rule was demanded in the specific circumstances presented; and (3) whether petitioner had "substantially complied" with the rule given "the realities of trial," and, therefore,

> whether demanding perfect compliance with the rule would serve a legitimate governmental interest.

Cotto v. Herbert, 331 F.3d 217, 240 (2d Cir. 2003) (quoting *Lee v. Kemna*, 534 U.S. 362 (2002)).

If a state court holding contains a plain statement that a claim is procedurally barred then the federal habeas court may not review it, even if the state court also rejected the claim on the merits in the alternative. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) ("a state court need not fear reaching the merits of a federal claim in an *alternative* holding" so long as it explicitly invokes a state procedural rule as a separate basis for its decision).

When a state court says that a claim is "not preserved for appellate review" and then rules "in any event" on the merits, such a claim is not preserved. *See Glenn v. Bartlett*, 98 F.3d 721, 724-25 (2d Cir. 1996). When a state court "uses language such as 'the defendant's remaining contentions are either unpreserved for appellate review or without merit,' the validity of the claim is preserved and is subject to federal review." *Fama v. Comm'r of Corr. Svcs.*, 235 F.3d 804, 810 (2d Cir. 2000). Where "a state court's ruling does not make clear whether a claim was rejected for procedural or substantive reasons and where the record does not otherwise preclude the possibility that the claim was denied on procedural grounds, AEDPA deference is not given, because we cannot say that the state court's decision was on the merits." *Su v. Filion*, No. 02-2683, 2003 U.S. App. LEXIS 13949 at *15 n.3 (2d Cir. July 11, 2003) (citing *Miranda v. Bennett*, 322 F.3d 171, 178 (2d Cir. 2003)). This congeries of holdings leaves it an open question whether there are "situations in which, because of uncertainty

as to what the state courts have held, no procedural bar exists and yet no AEDPA deference is required." *Id.*

VI. Actual Innocence

"[A] habeas petitioner may also bypass the independent and adequate state ground bar by demonstrating a constitutional violation that resulted in a fundamental miscarriage of justice, *i.e.*, that he is actually innocent of the crime for which he has been convicted." *Dunham v. Travis*, 313 F.3d 724, 729 (2d Cir. 2002).

Because habeas corpus "is, at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319 (1995), the Supreme Court has stated that "in appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration," *id.* at 320-21 (quotations omitted). To ensure that this exception remains rare and will be applied only in the extraordinary case, the Court has "explicitly tied" the miscarriage of justice exception to the petitioner's innocence. *Id.* at 321. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Id.* at 324.

A showing of actual innocence serves merely as a gateway to the airing of the petitioner's defaulted claim and is not itself cognizable in habeas as a free-standing claim. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("[C]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the

underlying state criminal proceeding."). A habeas court is, in short, concerned "not [with] the petitioners' innocence or guilt but solely [with] the question whether their constitutional rights have been preserved.'" *Id.* (quoting *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923)); *cf. Jackson v. Virginia*, 443 U.S. 307 (1979) (habeas court may review an *independent constitutional claim* that the evidence adduced at trial was insufficient to convict a criminal defendant beyond a reasonable doubt); *Thompson v. Louisville*, 362 U.S. 199 (1960) (reversing conviction of "Shuffling Sam" *on direct review* from conviction in Louisville's police court where there was no evidence that defendant violated city ordinances).

VII. Ineffective Assistance of Counsel

The Counsel Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This right to counsel is "the right to *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970) (emphasis added). The Supreme Court has explained that in giving meaning to this requirement we must be guided by its purpose -- "to ensure a fair trial" -- and that therefore the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to prevail on a Sixth Amendment claim, a petitioner must prove both that counsel's representation "fell below an objective standard of reasonableness" measured under "prevailing professional norms," *id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. *See also Wiggins v. Smith*, 539 U.S. __, No. 02-311, slip op. at 8-10

(June 26, 2003); *United States v. Eyman*, 313 F.3d 741, 743 (2d Cir. 2002). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The performance and prejudice prongs of *Strickland* may be addressed in either order, and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.* at 697. In evaluating the prejudice suffered by a petitioner as a result of counsel's deficient performance, the court looks to the "cumulative weight of error" in order to determine whether the prejudice "reache[s] the constitutional threshold." *Lindstadt v. Keane*, 239 F.3d 191, 202 (2d Cir. 2001). The court must also keep in mind that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. "The result of a [criminal] proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Purdy v. Zeldes*, No. 02-7468, 2003 U.S. App. LEXIS 2053, at *18 (2d Cir. Feb. 6, 2003) (quoting *Strickland*, 466 U.S. at 694). Ineffective assistance may be demonstrated where counsel performs competently in some respects but not in others. *See Eze v. Senkowski*, 321 F.3d 110, 112 (2d Cir. 2003).

As a general matter, strategic choices made by counsel after a thorough investigation of the facts and law are "virtually unchallengeable," though strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. Counsel, in other words, "has a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigations unnecessary." *Id.* at 691. Where counsel fails to make a reasonable investigation that is reasonably necessary to the defense, a court must conclude that the decision not to call an expert cannot have been based on strategic considerations and will thus be subject to review under *Strickland's* prejudice prong. *See Pavel v. Hollins*, 261 F.3d 210, 223 (2d Cir. 2001) (counsel ineffective in a child sexual abuse case where his failure to call a medical expert was based on an insufficient investigation); *Lindstadt*, 239 F.3d at 201 (same). The court of appeals for the Second Circuit has recently gone so far as to imply that all of counsel's significant trial decisions must be justified by a sound strategy -- a significant raising of the bar that would appear to require an unrealistic degree of perfection in counsel. *See Eze*, 2003 U.S. App. LEXIS 2511, at *78 - *79 (remanding to district court for factual hearing because it was "unable to assess with confidence whether strategic considerations accounted for . . . counsel's decisions").

There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Each factual claim made in support of an allegation of ineffective assistance of counsel must be fairly presented to a state court before a federal habeas court may rule upon it. *See Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) (dismissing petition as unexhausted where petitioner's claim of ineffective assistance of counsel alleged more deficiencies before the habeas court than were presented to the state court, because "[t]he state courts should have been given the opportunity to consider all the circumstances and the cumulative effect of all the claims as a whole" (quotation omitted)). Where an additional factual claim in support of the ineffective-assistance allegation merely "supplements" the ineffectiveness claim and does not "fundamentally alter" it,

dismissal is not required. *Caballero v. Keane*, 42 F.3d 738, 741 (2d Cir. 1994). Each significant factual claim in support of an ineffective-assistance allegation promised on appellate counsel's deficient performance must be exhausted. *See Word v. Lord*, No. 00 CIV. 5510, 2002 U.S. Dist. LEXIS 19923, at *34 - *35 (S.D.N.Y. Mar. 18, 2005) (Magistrate's Report and Recommendation).

Although the *Strickland* test was formulated in the context of an ineffective assistance of trial counsel claim, the same test is used with respect to claims of ineffective appellate counsel. *See Claudio v. Scully*, 982 F.2d 798, 803 (2d Cir. 1992). Appellate counsel does not have a duty to advance every nonfrivolous argument that could be made, *see Jones v. Barnes*, 463 U.S. 745, 754 (1983), but a petitioner may establish that appellate counsel was constitutionally ineffective "if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker," *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994). Either a federal or a state law claim that was improperly omitted from an appeal may form the basis for an ineffective assistance of appellate counsel claim, "so long as the failure to raise the state . . . claim fell outside the wide range of professionally competent assistance." *Id.* (quotations omitted).

VIII. Errors of State Law

Federal habeas corpus relief does not lie for mere errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Nonetheless, the Due Process Clause requires that state courts conducting criminal trials "proceed consistently with 'that fundamental fairness' which is 'essential to the very concept of justice.'" *Dunnigan v. Keane*, 137 F.3d 117, 125 (2d Cir. 1998) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)). Errors of state law that rise to the level of a constitutional

violation may be corrected by a habeas court, but even an error of constitutional dimensions will merit habeas corpus relief only if it had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quotation omitted).

IX. Evidentiary Error

For a habeas petitioner to prevail on a claim that an evidentiary error amounted to a deprivation of due process, he must show that the error was so pervasive as to have denied him a fundamentally fair trial. *United States v. Agurs*, 427 U.S. 97, 108 (1976). The standard is "whether the erroneously admitted evidence, viewed objectively in light of the entire record before the jury, was sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it. In short it must have been 'crucial, critical, highly significant.'" *Collins v. Scully*, 755 F.2d 16, 19 (2d Cir. 1985) (quoting *Nettles v. Wainwright*, 677 F.2d 410, 414-15 (5th Cir. 1982). This test applies post-AEDPA. *See Wade v. Mantello*, No. 02-2359, slip op. at 13 (2d Cir. June 13, 2003).

X. Verdict Against the Weight of the Evidence

To the degree petitioner claims that his guilt was not proven beyond a reasonable doubt, the relevant question for this court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Petitioner "bears a very heavy burden" when challenging the legal sufficiency of the evidence in a state criminal conviction. *Einaugler v. Supreme Court*, 109 F.3d 836, 840 (2d Cir. 1997). To the degree petitioner claims the

verdict was against the weight of the evidence, such a claim does not present a federal constitutional issue.

XI. Legal Claims Frequently Raised in Habeas Corpus Applications.

For an explication of the law concerning other claims that are frequently raised before this court in applications for a writ of habeas corpus, *see Waters v. McGuiness*, 99-CV-0615, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11077, at *4 - *5 (E.D.N.Y. June 16, 2003) (grand jury claims); *Custodio v. Duncans*, Nos. 99-CV-2561, 03-MISC-00669 (JBW), 2003 U.S. Dist. LEXIS 11050, at *4-*7 (E.D.N.Y. June 11, 2003) (*Batson* challenges); *Reyes v. Irwin*, 99-CV-3758, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11045, at *5 -*6 (E.D.N.Y. June 20, 2003) (*Wade* claims); *Brathwaite v. Duncan*, 00-CV-0860, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11056, at *4-*5 (E.D.N.Y. June 10, 2003) (*Sandoval* claims); *Thomas v. Kuhlman*, 255 F.Supp.2d 99, 108-09 (E.D.N.Y. 2003) (perjured testimony); *Martinez v. Greiner*, 99-CV-4663, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11046, at *7 (E.D.N.Y. June 20, 2003) (Fourth Amendment claims); *Plunkett v. Keane*, 97-CV-1992, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11048, at *8-*9 (E.D.N.Y. June 10, 2003) (*Rosario* claims); *Beniquez v. Bennett*, 00-CV-0985, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11032, at *15-*16 (E.D.N.Y. June 16, 2003) (prosecutorial misconduct); *Sevencan v. Herbert*, No. 01-2491, slip op. at 6-13 (2d Cir. Aug. 7, 2003) (public trial); *Cox v. Donnelly*, 99-CV-8216, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 9886, at *12-*14 (E.D.N.Y. June 12, 2003) (shifting burden of proof); *Jelinek v. Costello*, 247 F. Supp.2d 212, 266-67 (E.D.N.Y. 2003) (right to self-representation); *Stewart v. Senkowski*, 00-CV-0806, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11028, at *6 (E.D.N.Y. June 16, 2003) (erroneous jury instructions); *Jenkins*

v. Artuz, 98-CV-7837, 00-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11049, at *7-*8 (E.D.N.Y. June 13, 2003) (abuse of discretion in sentencing).

XII. Harmless Error

In order to be entitled to habeas relief, a petitioner must ordinarily demonstrate that any constitutional error "had substantial and injurious effect or influence in determining the jury's verdict," and that the error resulted in "actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quotation marks omitted).

When a claim was never adjudicated on the merits in the state courts and there is no ruling which commands AEDPA deference, it is unclear what the standard for review for harmlessness should be in a collateral attack when a federal court finds constitutional error. Should it proceed under the "beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18 (1967) (conviction infected by constitutional error must be overturned unless "harmless beyond a reasonable doubt") or under the "substantial and injurious effect or influence" standard of *Brecht* (for cases on collateral review, an error is generally considered harmless if it did not have a "substantial and injurious effect or influence in determining the jury's verdict")? The correct standard of review is an open question in this circuit. *See Cotto v. Herbert*, No. 01-2694, 2003 U.S. App. LEXIS 8326, at *92 (2d Cir. May 1, 2003).

XIII. Analysis of Claims

The New York State Court of Appeals' decision that petitioner received the effective assistance of counsel is entitled to deference. That Court adjudicated the merits of petitioner's

ineffective-assistance-of-counsel claim. That the Court of Appeals, unlike the Appellate Division, has only a limited power to decide issues of law rather than of fact does not affect the federal deference issue. *Compare* N.Y. Criminal Procedure Law section 470.20 ? section 470.35.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner's habeas corpus petition "shall not be granted with respect to any claim that was adjudicated on the merits" in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established" Supreme Court law. 28 U.S.C. § 2254(d)(1). This standard requires deference to state-court determinations on the law as well as the facts and is different from the previous de novo standard because even an incorrect determination must be upheld if it is reasonable. *Williams v. Taylor*, 529 U.S. 362, 410 (2000).

A state court adjudicates a federal claim on the merits when it disposes of the claim "on the merits," and reduces its disposition to judgment. *Sellan v. Kuhlman*, 261 F.3d 303, 309 (2d Cir. 2001). To determine whether a state court disposes of a claim on the merits, courts should consider (1) what the state courts have done in similar cases, (2) whether there was any indication that the state court was aware of any ground for not adjudicating the claim on the merits, and (3) whether the opinion suggests a reliance upon procedural grounds rather than a determination on the merits. *Sellan v. Kuhlman*, 261 F.3d at 314 (quoting *Mercadel v. Cain*, 179 F.3d 271, 274 [5th Cir. 1999]). When the state court does so, a federal habeas court must defer to the state court's decision in the manner prescribed in 28 U.S.C. § 2254(d)(1) even if the state court does not explicitly refer to the federal claim or to relevant federal case law. *Id; accord Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000).

In *Williams v. Taylor*, the Supreme Court delineated an analytical framework for the new deferential standard of review, identifying the need to treat independently the "contrary to," and the "unreasonable application of," clauses of section 2254(d)(1). With respect to the "contrary clause," the Court held that the writ may issue in two circumstances: first, if the state-court decision applied the incorrect legal standard or rule to the case; and second, if the state-court decision addressed a set of facts "materially indistinguishable" from a relevant Supreme Court case and arrived at a result opposite to that reached by the Court. *Id.* at 404-406.

The Court recognized that the "contrary to" clause will not be implicated often. Instead, habeas review of the majority of state-court decisions will implicate the "unreasonable application" clause of section 2254(d)(1). A state court decision involves an unreasonable application of Supreme Court precedent when the state court either "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts" of the case or, "unreasonably extends a legal principle from [the Court's] precedent to a new context where is should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 406-407.

An "unreasonable application" inquiry is limited. In this regard, the habeas court should ask only if the state court's application of Supreme Court precedent was "objectively unreasonable." The inquiry is not subjective, and is not dependent on a "reasonable jurists" test. *Id.* at 408-410. And significantly, "an unreasonable application of federal law is different from an incorrect application of federal law is different from an incorrect application of federal law." *Id.* at 410. A habeas court may no longer "issue the writ simply because that court concludes . . . that the relevant state-court decision

applied clearly established federal law erroneously or incorrectly." *Id.* The court may issue the writ only if the application of federal law was also unreasonable. *Id.*

Since *Williams v. Taylor*, the Court of Appeals for the Second Circuit has addressed the issue of what constitutes an "unreasonable application" of Supreme Court law in several cases. In determining whether a state-court decision is unreasonable, that Court has held that to be unreasonable, "[s]ome increment of incorrectness beyond error is required." *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000).

As applied to ineffective assistance of counsel claims, AEDPA requires a petitioner to show that the state court applied *Strickland v. Washington*, 466 U.S. 668 (1984), to the facts of the case in an objectively unreasonable manner. "He must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance." *Bell v. Cone*, __U.S.__, 122 S. Ct. 1843 (May 28 2002). Because the New York Court of Appeals adjudicated the merits of petitioner's ineffective-assistance-of-counsel claim, its decision is entitled to deference in this Court. Petitioner has not shown that the state court's decision was contrary to, or an unreasonable application of, established Supreme Court precedent.

The New York Court of Appeals' detailed decision rejecting petitioner's claim constitutes an adjudication on the merits for federal habeas purposes. It is entitled to section 2254's deferential standard of review.

Counsel is "strongly presumed" under *Strickland* to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional

judgment. 466 U.S. at 688; *United States v. Cronic*, 466 U.S. 648, 658 (1984).

In rejecting petitioner's claim, the Court relied on *People v. Baldi, supra*, that holds that "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." *People v. Baldi*, 54 N.Y.2d at 147, 444 N.Y.S.2d at 898. This standard is not contrary to *Strickland*. *See Loliscio v. Goord*, 263 F.3d 178 (2d Cir. 2001); *Lindstadt v. Keane*, 239 F.3d 191 (2d Cir. 2001).

Considering counsel's representation as a whole, the New York Court reasonably concluded that counsel provided petitioner with effective representation. In this regard, the record reveals that counsel zealously and effectively represented petitioner at every stage of the proceedings. Before trial, counsel moved to suppress the victim's identification testimony, extensively cross-examined the State's police witness, and argued that the line-up was unduly suggestive (Primerano: H 16-35). At trial, counsel strenuously objected to the prosecution's *Sandoval* and *Molineux* applications (Sandoval: 16-18), conducted a competent voir dire (Voir Dire: 95-96), and delivered an effective opening statement, in which he raised a strong misidentification defense and emphasized the prosecution's burden of proof (Opening: 163, 167). Throughout the course of the trial, counsel raised numerous objections to the prosecutor's questions and arguments, many of which were sustained. He also conducted extensive cross-examination of the State's witnesses, efficiently attacking the victim's credibility by eliciting testimony that he had a suspended license and a misdemeanor conviction (Mitchell: 173, 175).

Counsel presented four exhibits to support his misidentification defense, including the complaint report which revealed discrepancies between the victim's initial description of petitioner and his actual appearance, and the arrest photograph, which showed that although Mr. Mitchell had described petitioner as having short, wavy hair, petitioner had a full head of hair at the time of the arrest (Primerano: 264, 265-266; Summation: 319-20, 321). Counsel also republished the lineup photo to the jury, arguing that the lineup was suggestive because petitioner was taller than the five fillers (Primerano: 271, 324). Counsel presented a defense witness - Lakesha Person, not only to attempt to offer an alibi for petitioner, but also to support the misidentification defense. In this vein, counsel elicited that petitioner had a large tattoo on his chest, which had not been described by the victim (Person: 285). Counsel also elicited that in the four years that she had known petitioner, Person never saw him wear a gold tooth in his mouth -- a characteristic that the victim had mentioned in his description of the robber (Person: 285-86).

During his summation, counsel presented a cohesive summary of the evidence supporting the misidentification defense. He persuasively argued that Mr. Mitchell's description of the perpetrator did not match petitioner's appearance, and specifically highlighted the differences between Mitchell's description and petitioner's pedigree information (Summation: 328-29). He also referred to Person's testimony that petitioner did not have a gold tooth, and that he had a large tattoo on his chest, arguing that these factors also supported the conclusion that petitioner was not the perpetrator (Summation: 322-23). Counsel emphasized that the eyewitness neighbor who had called the police was never questioned, and did not testify at trial, thus implying that there was a gap in the State's evidence (Summation: 336).

Counsel also objected to portions of the court's charge and, after the verdict, argued for a lenient sentence, citing petitioner's youth and family background as mitigating factors (Sentencing: 7). Then, after the sentence was imposed, counsel requested that petitioner receive credit for the time he had already served (Sentencing: 11). Thus, viewed in its totality, the record demonstrates that counsel zealously, thoroughly, and effectively represented petitioner throughout the trial.

There is no reasonable possibility that, absent counsel's decision to elicit the alibi testimony, the outcome of petitioner's trial would have been different. *See Strickland v. Washington*, 466 U.S. at 694.

Although the case is not free from doubt, this claim does not warrant granting the writ.

XIV. Conclusion

Those claims not discussed in this memorandum are frivolous.

The petition for a writ of habeas corpus is denied.

A certificate of appealability is granted with respect to ineffective assistance of counsel, petitioner having made a substantial showing of the possible denial of a constitutional right. He may as already indicated, seek a further certificate of appealability from the Court of Appeals for the Second Circuit.

SO ORDERED

Jack B. Weinstein
Senior District Judge

Dated: October 8, 2003
Brooklyn, NY